86-1117

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RAYMOND BARTMAN, et al.,

Plaintiffs,

v.

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE, et al.,

Defendants.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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December 30, 1986

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In the

United States Court of Appeals

For the Seventh Circuit

No. 85-2372

RAYMOND BARTMAN, et al.,

Plaintiffs-Appellants,

v.

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and LOCAL 248—UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 83 C 435—Terence T. Evans, *Judge.*

ARGUED FEBRUARY 10, 1986—DECIDED AUGUST 20, 1986

Before BAUER, FLAUM and EASTERBROOK, *Circuit Judges.*

BAUER, *Circuit Judge.* Appellants are sixty-five former employees of Allis-Chalmers Corporation. In 1983 they filed this law suit under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 *et seq.*, seeking damages and reinstatement and naming Allis-Chalmers ("A-C") and their union, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local No. 248 ("the Union") as defen-

dants. The district court granted defendants' motions for summary judgment, and this appeal followed. We affirm.

I.

Summary judgment is properly granted only if it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. In determining whether any issues of material fact are in dispute, the inferences drawn from the record must be viewed in the light most favorable to the non-moving party. *Rodeo v. Gillman*, 787 F.2d 1175 (7th Cir. 1986); *Janowiak v. City of South Bend*, 750 F.2d 557, 559 (7th Cir. 1984). We have frequently noted that summary judgment may be inappropriate where motive or intent are at issue, as is often true in discrimination cases. *See, e.g., Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 97 (7th Cir. 1985).

In reviewing a summary judgment this court must view the whole record, and must reverse if it is revealed that inferences concerning material facts contrary to those of the trial court may be drawn. *Powers v. Dole*, 782 F.2d 689, 694 (7th Cir. 1986). We are not, however, required to draw every *conceivable* inference, but only those that are reasonable. *Matthews v. Allis-Chalmers Corp.*, 769 F.2d 1215, 1218 (7th Cir. 1985); *Parker v. Federal National Mortgage Association*, 741 F.2d 975, 980 (7th Cir. 1984).

Viewed in accordance with these principles, the record discloses the following undisputed facts: A-C is a manufacturer of farm implements headquartered in the Milwaukee area. In late 1981 and 1982, during a period of substantial financial losses, A-C informed the Union that it wanted to open negotiations to seek concessions in the collective bargaining agreement then in force, which was scheduled to expire on November 1, 1982. A-C planned to ask for concessions on wages and benefits, and this desire was communicated to Union officials and to the employee population as a whole.

Negotiations actually began in October of 1981 and continued intermittently until July 31, 1982, when they were temporarily suspended due to lack of progress. As the expiration date of the old contract neared, certain A-C employees became concerned about the status of their retirement benefits under the company's Pension Plan, an agreement separate from the contract but set to expire on the same day. Among these employees were plaintiffs, who at the time were eligible to retire immediately under the "early retirement" provisions of the Pension Plan. The Plan made early retirement available to those with 30 or more years of service at A-C. Plaintiffs were not worried about the sufficiency of benefits under whatever new contract would be negotiated; rather, their concern centered on any "window" period between the expiration of the old contract and Pension Plan and ratification of the new ones.[1] A-C management, anticipating these concerns, had projected an increase in early retirements as the expiration date approached.

As the November 1 deadline neared it became clear that no new contract would be agreed upon before the old one expired. A-C and the Union, having resumed negotiations, first agreed to an extension of the old contract until November 15. When even this period proved insufficient, the company and the Union announced that work would be available for all employees at the old contract's wage scale. (A-C remained in operation under those conditions until a new contract was negotiated on January 24, 1983 and ratified on February 6.)

In the weeks before the expiration of the old contract, concern among retirement-eligible employees about the future of their pension benefits mounted. At least two persons in A-C management suggested issuance by the company of a statement that would include a promise to give employees advance warning of any benefit plan changes;

[1] Actually, upon expiration of the Pension Plan A-C had the right to unilaterally suspend, continue or modify the Plan.

this would have assured retirement-eligible employees of the opportunity to work as long as possible without actually risking their benefits, which is exactly what plaintiffs wanted to do. The Union also brought up the possibility of a statement in its negotiations with A-C in November of 1982. Ultimately A-C declined to issue such a statement.[2]

A substantial number of eligible employees, including plaintiffs, retired just before the expiration of the old contract. However, A-C did allow those retiring during November of 1982 to rescind their retirements and return to work by November 30 without loss of seniority, and some did so. A total of 320 employees retired between October 31 and November 15, not including 61 who elected to rescind their retirements and go back to work before the end of November.

Negotiations continued after the old contract expired. Plaintiffs asked the Union to raise the subject of their retirements, which they had come to view as "forced," in those negotiations. The subject was raised at bargaining sessions in December, 1982 but A-C refused to give in on the issue. In January of 1983 the General Counsel of the National Labor Relations Board moved to add charges related to the retirements to unfair labor practice charges already pending against A-C concerning its conduct in bargaining in 1982. When the new contract was finally ratified in February of 1983, the NLRB charges were dismissed as part of the contract settlement.

II.

In granting A-C's motion for summary judgment, the district court concluded that plaintiffs could not make out

[2] The record indicates that Dan Kern, Director of Employee Relations for A-C, responded to several individual employees' inquiries by stating that A-C had no imminent plans to change benefits and that the Union would be advised prior to any such changes. This statement was never formally issued by A-C.

a *prima facie* case of age discrimination because they could not show that they were "constructively discharged." The court found that plaintiffs' status was not made intolerable by any action on A-C's part, but rather by uncertainty about their future due to the imminent expiration of the contract. There resulted, in the court's words, "retirement decisions that, while agonizing, were voluntary." *Decision and Order* of July 31, 1985, at p. 8.[3]

Plaintiffs argue that the district court failed to analyze their case on a disparate impact theory, under which an employment practice that is neutral on its face is unlawful if in fact it has a disproportionate impact on a protected group, in this case older workers. *See, e.g., Griffin v. Board of Regents of Regency Universities*, No. 84-2981, slip op. at p. 11 (7th Cir. June 18, 1986) (Title VII case). Plaintiffs note the unusually large number of early retirements in the days immediately preceding the expiration of the contract, which in their view demonstrates the necessary disparate impact. The "employment practice" plaintiffs challenge is A-C's decision to make work available during the "window" period at old contract rates, an "employment opportunity" neutral on its face but, as plaintiffs see it, impossible for older workers, *i.e.* those eligible for early retirement, to take advantage of

[3] The district court viewed plaintiffs' claim that A-C was obligated to publicly declare in advance its intentions with regard to the Pension Plan as presenting a potential conflict between plaintiffs' collective rights under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, and their individual rights under the ADEA. *See E.E.O.C. v. County of Calumet*, 686 F.2d 1249 (7th Cir. 1982). A-C argued in the district court that the requested statement would have constituted direct bargaining with a separate group of employees in derogation of its obligation to bargain with the Union. On appeal, though, plaintiffs make it clear that they were not concerned with what provisions the new contract and Pension Plan would hold, but rather feared the consequences of retiring during the "window" period when no contract was in force. Under this argument, then, no conflict arises between the two statutes, although the bargaining situation remains important in analyzing these facts.

without assurances that their retirement benefits would not be lost.

We agree with the district court's conclusion that plaintiffs have failed to demonstrate that their retirements amounted to constructive discharges by A-C. Contrary to plaintiffs' assertions in this court, the district judge was obviously aware that plaintiffs would have *preferred* to remain on their jobs, as is demonstrated by his sensitivity to the "agonizing" nature of the choices they faced. However, an employee is not constructively discharged whenever he elects to leave a job he would, on the whole, rather keep, without regard to the actual reason for his departure. An employer constructively discharges an employee only if it "*makes* an employee's working conditions so intolerable that the employee is forced into an involuntary resignation . . ." *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 926 (5th Cir. 1982), *quoting Young v. Southwestern Savings and Loan Association*, 509 F.2d 140, 144 (5th Cir. 1975) (emphasis added). In the instant case the condition that "made" plaintiffs' situation apparently intolerable to them was not any action of A-C, but rather the expiration of the Pension Plan, an event brought about by the failure of the contract negotiations and the passage of time. Plaintiffs have not argued, nor could they on this record, that A-C delayed the contract process in order to induce their retirements by allowing the plan to expire.

Another way to look at it is to say that plaintiffs have failed to present evidence that any action by A-C caused their departure. Proof that the disputed employment practice was the cause of the allegedly unlawful condition is a requirement of liability under a disparate impact theory. *E.E.O.C. v. Greyhound Lines, Inc.*, 635 F.2d 188, 193 (3rd Cir. 1980); *see also United States v. Town of Cicero*, 786 F.2d 331, 336 (7th Cir. 1986) (Posner, J., concurring and dissenting). Plaintiffs retired because they did not want to risk the loss of their pension benefits if they retired during the period between contracts. As observed above, the expiration of the contract was the cause of the "win-

dow" period. The extension of the "opportunity" to work without a contract did not change the status of plaintiffs' pension benefits; even if A-C had chosen to lock out the Union, the same danger of loss of benefits would have existed during the period between contracts.

The "employment practice" that is really at the heart of plaintiffs' argument is A-C's refusal to declare its intentions about pension rights in advance of the expiration of the contract. This argument must fail because there is no "act" by A-C involved; rather, plaintiffs complain about the absence of an act. We are aware that it might be possible in some cases to characterize positive acts in negative terms, but this is not such a case. A-C was not obligated to rescue plaintiffs from a predicament for which it was not responsible. To require it to do so would be to require A-C to treat older workers *better* than workers generally. The ADEA imposes no such obligation. *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1217 (7th Cir. 1985).

III.

To the extent plaintiffs' claims against the Union rest on its alleged acquiesence in A-C's conduct, those claims must fall in light of our disposition set forth in part II above. Plaintiffs also fault the Union for failing to pursue their reinstatement in the collective bargaining proceedings that took place after they retired and the old contract expired.

Plaintiffs correctly contend, as we held in *E.E.O.C. v. County of Calumet*, 686 F.2d 1249, 1256-57 (7th Cir. 1982), that a labor union may not, as part of the collective bargaining process, waive employee rights under the ADEA. *See generally Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974). As we have held above, though, plaintiffs' rights under the ADEA were not violated. Plaintiffs claim is more properly viewed as alleging that the Union breached its duty of fair representation by failing to obtain their reinstatement through the bargaining

process, and that this failure to bargain hard enough on their behalf was the result of the Union's view that, as older workers, they were more expendable.

In *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 868 (7th Cir. 1985), we held that employees alleging racial discrimination by their Union in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, could make out a *prima facie* case in the context of a breach of an existing collective bargaining agreement. Like Title VII, the ADEA is specifically applicable to labor organizations, 29 U.S.C. § 623(c), and we may assume (without deciding) that plaintiffs could state an ADEA claim against the Union based on failure to bargain with sufficient vigor. Nevertheless the record assembled below does not support plaintiffs' contention that the Union simply abandoned them because it felt that the interests of younger workers were more important. In fact, several hundred other A-C workers lost their jobs at the time of the 1982 negotiations as a result of plant closings and subcontracting of some of A-C's work outside the company. These job losses were among the subjects of the NLRB charges pending during the negotiations and dropped as part of the agreement on the new contract.[4]

Plaintiffs' principal evidence of the Union's intent to discriminate consists of statements allegedly made by Richard Roznik, president of the Union's Local 248 at A-C, to two of the plaintiffs, as well as statements made in Roznik's own affidavit filed in the district court. Plaintiff Elanor West stated that she heard Roznik tell a group of retirees that he "didn't have time to worry about 'your little problem' and that he was concerned about 'the guy with seven years that's on lay off.' " Plaintiff Al Molnar stated in his affidavit that Roznik suggested he take his

[4] As noted above, charges concerning plaintiffs' retirements were never formally added to those pending before the NLRB. The General Counsel's request to add those charges to the complaint was also abandoned when the agreement was reached.

complaints to the NLRB "as he was more concerned about the younger workers who had no vested pension rights." For purposes of this appeal we must assume that the plaintiffs' versions of Roznik's statements are accurate.

Roznik's own affidavit describes several incidents at bargaining sessions in November and December, 1982 in which Union negotiators attempted either (1) to get an extension of the period within which recently retired employees could rescind their retirements, or (2) to gain reinstatement for them. Although Roznik was not the chief negotiator, he did give four reasons why he did not thereafter continue to raise the issue of plaintiffs' retirements. These reasons included his conclusion that plaintiffs' retirements were voluntary, his desire to avoid further displacement of active workers as a result of any recalls of retirees, and his feeling that the Union had gotten all it could out of A-C (in the form of the contract extension and the November retirement rescission period).[5]

The first of these conclusions has turned out to be correct. The second is regarded by plaintiffs as concrete evidence of discrimination; coupled with Roznik's statements to West and Molnar, it is said to demonstrate that plaintiff's rights were discriminatorily subordinated to those of younger workers. We do not believe that this evidence will support such a conclusion. At most, these statements show that the Union negotiators were attempting to advance many competing concerns. Among these were plaintiffs' retirements which, as we have held, implicated no statutory rights. Absent a violation of law, the Union was not obliged to press plaintiffs' case at any expense.

[5] The Union argues initially that it had *no* obligation to bargain on behalf of plaintiffs because they were voluntary retirees. We need not reach the correctness of this argument because the Union *did* make efforts in their behalf, efforts which we find herein to have been made in a non-discriminatory manner.

The record reflects that the Union lost a lot of fights in the course of bargaining, and plaintiffs' was one of them. Roznik's decision that plaintiffs' cause was lost and that more could be done for other workers was not an act of age discrimination when viewed in the context of collective bargaining on a full slate of employment issues and in the absence of any statutory rights. The Union's duties in this case were conflicting, and its resolution, at least as expressed by its Local's President, reflect a pragmatic accounting of all relevant facts and factors, rather than a decision to "dump" workers perceived to be of less value.

IV.

The district court's. grant of summary judgment to defendants is

AFFIRMED.

A true Copy:

Teste:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RAYMOND BARTMAN, et al.,
Plaintiffs,

v.

CIVIL ACTION NO. 83-C-0435

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND LOCAL 248, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendants.

DECISION AND ORDER

This is an age discrimination lawsuit for damages and reinstatement brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623, et seq. The plaintiffs, sixty-five former employees of the Allis-Chalmers Corporation's West Allis plant, allege that the company discriminated against them during the 1982 contract negotiations, in violation of the ADEA.

The plaintiffs have also sued their union, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and Local #248, claiming violations of the ADEA in connection with the same contract negotiations. The case is before me on the defendants' motions for summary judgment on the primary ground that the plaintiffs' allegations fail to state a claim under the ADEA.

Facts

The circumstances on which the plaintiffs ground their case comprise a rather sad chapter in the history of Allis-Chalmers, a farm implement manufacturer and one of the Milwuakee area's old bedrock companies. During 1981, the business was in substantial decline. It sustained a loss that year and predicted more red ink in 1982. On August 17, 1982, Allis-Chalmers

announced the elimination of certain diesel engine production lines and the removal of other work to another location. This caused the loss of 350 jobs. On August 21, 1982, the company made public its plans to lay off 550 additional workers in West Allis by the end of the year. Union officials suspected that Allis-Chalmers planned to move its operations out of West Allis altogether. The union initiated unfair labor practice proceedings in connection with the layoffs and work transfers. The plant's decline and eventual demise has been extensively reported in the local media.

It was in this gloomy atmosphere that the 1982 contract negotiations took place. The collective bargaining agreement then in effect was due to expire on November 1, 1982. Early on, the company notified the union that it

would seek concessions from its employees. The union rejected the company's claim that concessions were needed.

Negotiations occurred peridoically throughtout 1982, without success. As the November 1 expiration date loomed, both sides agreed to a 15-day extension of the contract to allow for further discussion. When it became clear that no agreement would be reached by November 15th, the union decided that its members would work without a contract rather than strike on the expiration of the bargaining agreement. (The union had struck the company eight times since 1950.) In a notice posted on November 12, 1982, the company stated that employees working without a contract would continue to be paid according to the old contract's wage scale.

Meanwhile, the plaintiffs -- all employees with thirty or more years with the company and therefore eligible for early retirement -- were increasingly concerned about their options in the event of a contract lapse. The contract negotiations in progress throughout 1982 included renegotiation of the pension agreement, which would expire with the contract on November 15, 1982.

Furthermore, in the atmosphere of uncertainty -- normal in all collective bargaining situations but heightened at Allis-Chalmers in 1982 due to the poor health of the company -- the plaintiffs' anxiety over what a new contract might contain was severe. As the plaintiffs saw it, they had a choice: retire before November 15 under the generous early retirement provisions of the old contract, or risk reductions of those benefits in the interim or under a new

contract. The plaintiffs chose the no-risk solution. All but one of the plaintiffs took early retirement. Plaintiff William Best took disability retirement.

Before they retired, however, the plaintiffs told the union of their fears. Before the contract lapsed, the union asked the company to divulge what changes, if any, it would make in wages and benefits it the ocntract expired. The company refused to discuss its intentions. The union asked for a written assurance that it would be given advance notice of any benefit changes so that retirement-eligible employees could retire at the old benefit level before the changes became effective. According to the plaintiffs' version of the story, the company and the union discussed the issuance of the following statement:

> There are no imminent

> plans to change pension and insurance. Before any changes would be made there would be discussion with the Union, and individuals would have an opportunity to retire prior to any change in the present benefits (Angermeier affidavit, Exhibit 12 (e)).

Allis-Chalmers refused to issue the statement, but decided to allow those employees who retired during November, 1982, to rescind their retirements before November 30, 1982 and return to work without loss of seniority. Without the above written assurance, the plaintiffs would not return to work. (Sixty-one other early retirees took advantage of the company's waiver of the rules and returned to work.) The plaintiffs were replaced by younger workers recalled from layoff.

Collective bargaining continued after the expiration of the contract. The plaintiffs wanted the subject of their

retirements -- which they looked upon as forced -- on the bargaining table. The union raised the subject during nogotiations, but not vigorously enough for the plaintiffs. On January 13, 1983, the General Counsel of the National Labor Relations Board (NLRB) moved to amend the union's pending unfair labor practice charges to include the issue of the "forced" retirements.

On January 24, 1983, tentative agreement on a new contract was reached. According to the plaintiffs, the agreement was brought about in part by the union's offer to drop the pending NLRB charges in exchange for recognition of the UAW at a previously unrepresented Allis-Chalmers plant in Batavia, Illinois. The new contract was ratified on February 6, 1983. The NLRB charges, which included the complaints of the plaintiffs, were dismissed. The

plaintiffs then filed this lawsuit.

Disucssion

The ADEA Provides:

Sec. 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual whti respect to his compensation, terms, conditions, or privileges or employment, because of such individual's age;

. . .

29 U.S.C. Sec. 623 (a) (1).

The plaintiffs' case against Allis-Chalmers is based on the company's refusal, in the middle of collective bargaining, to issue a written statement of assurance to older workers that they would be notified in advance of any reduction in pension benefits and given an opportunity to retire at the old benefit level. The plaintiffs argue that this conduct had a disparate impact

on older workers or, alternatively, constituted disparate treatment of older workers, in violation of the ADEA.

In the plaintiffs' view[1], Allis-Chalmers' refusal to issue the statement was calculated to create "mass confusion" among older workers, to "gain leverage" over the union in negotiations, to "prey upon" older workers' fears about their benefits and confront them with a "Hobson's choice" which would undobtedly result in a massive reduction of the work force consistent with the company's need to trim manpower levels.

The plainfiffs' case against the union rests primarily on what the plaintiffs see as the union's acquiescence in the discriminatory conduct of the company.

---

1. While I must, on summary judgment, accept the plaintiffs' version of the facts, I need not accept their conclusions.

They argue that the union was more concerned about the fate of younger workers for whom pensions had not yet vested. The plaintiffs contend that the union "bartered" their rights away in exchange for recognition of the UAW at the Batavia plant.

Allis-Chalmers replies that the plaintiffs were essentially demanding a de facto extension of the contract, in circumvention of the collective bargaining process. The company argues that it simply could not have issued the statement the plaintiffs asked for, because it then would have been bargaining directly with one group of employees outside the collective bargaining process. Besides, the company argues, the plaintiffs all retired voluntarily, and therefore have no claim under the ADEA unless I construe their retirements as

constructive discharges. The union for the most part joins in the company's arguments.

I am sympathetic to the predicament in which the plaintiffs found themselves during the troubled 1982 contract negotiations. But I do not agree that the company's conduct, nor that of the union, was age discrimination. This case is problematical because it implicates the ADEA in a collective bargaining context. But I agree with Allis-Chalmers that to establish a prima facie case of age discrimination the plaintiffs must -- and are not able to-- show that they were constructively discharged.

In so concluding I am not unaware of the implication in this case of the rule that collective bargaining processes and agreements cannot ordinarily supersede individual rights to be free from

discrimination. EEOC v. County of Calumet, 686 F.2d 1249 (7th Cir. 1982). What happened in this case happened in the context of difficult and protracted contract negotiations. The conduct of the company and the union was governed by what each saw as its collective bargaining duty under the National Labor Relations Act (NLRA), 29 U.S.C. Secs. 151, et seq. Even so, the County of Calumet case held that where the prerogatives of the collective bargaining process collide with individual rights under the ADEA, the dictates of national labor policy are usually subordinate to individual rights. County of Calumet, supra, at 1256.

At issue in the Calumet County case, however, was a mandatory retirement age policy under which the plaintiff was literally forced to retire. In this

case, the plaintiffs seek to escape retirement decisions that, while agonizing, were voluntary. To make out a prima facie case of age discrimination in these circumstances, the plaintiffs must prove that tney were constructively discharged. Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983); Caslin v. General Electric Co., 696 F.2d 45 (6th Cir. 1982); Downey v. Southern Natural Gas Co., 649 F.2d 302 (5th Cir. 1981); (the Seventh Circuit reserved judgment on this question in EEOC v. County of Calumet, 686 F.2d at 1256, n.5).

> The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved herein as if it had formally discharged the aggrieved employee.

Young v. Southwestern Savings & Loan

Assn., 509 F.2d 140, 144 (5th Cir. 1975).

The parties disagree on the requirement of intent among the elements of constructive discharge. Allis-Chalmers argues that the plaintiffs must prove not only that the employer intentionally created intolerable working conditions, but that it did so for the purpose of forcing the employee to resign. The plaintiffs argue that the employer need not have intended the resignation. Rather, they argue, the employer need only have intentionally created intolerable working conditions so that a reasonable person in the employee's shoes would have felt compelled to resign. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980).

The Court of Appeals for the Seventh Circuit has not addressed this question.

However, in Brown v. Brienen, 722 F.2d 360 (7th Cir. 1983), the court cited Bourque in connection with a reference in dicta to the constructive discharge doctrine. Brown v. Brienen, supra, at 365. While concededly without precedential effect, this reference could be taken as an indication of the court's inclination on the subject.

However, even under the lower standard of the Bourque case, there has been no constructive discharge here. Allis-Chalmers did nothing to make the plaitniffs' working conditions intolerable. If the plaintiffs' working conditions can be called "intolerable," they were made so by the fact of the imminent contract expiration, not any action on the part of the company, or the union, for that matter.

The plaintiffs have focused their argument on the company's refusal to

issue the written assurance about the pension benefits. However, the fact that Allis-Chalmers balked at issuing such a statement does not change the outcome here. To hold that it does imposes a duty on the company that it plainly does not have: the duty to make a separate agreement, in the midst of collective bargaining, with one group of employees to ward off a discrimination claim.

Furthermore, the record is clear that the plaintiffs retired based on their own speculation about what might happen in the future. If their situation was intolerable, then they were in the same boat as the workers who were not retirement-eligible, whose fears about the future of Allis-Chalmers were, if different, at least as great as those of the plaintiffs. To retire early was surely one reasonable response to the

dilemma. But that does not render their retirement choices involuntary.

Nor can I conclude that the union's conduct was discriminatory. The bulk of the plaintiffs' case against the union is based on its alleged complicity in the company's discrimination. Having already concluded that Allis-Chalmers did not discriminate, I must also conclude that, at least in this respect, the union did not discriminate.

As for the claim that the union "bartered away" the rights of the plaintiffs, it too falls short. The union was unsuccessful in negotiating the plaintiffs back into the work force. This does not make it guilty of age discrimination. The union dropped its unfair labor practice charges, including the charge involving the plaintiffs, in exchange for recognition of the UAW at the Batavia plant. The plaintiffs'

complaint, however, was only one of several NLRB charges then pending. The union put them all on the table, which was its prerogative as the plaintiffs' elected representative at the negotiations. All were dismissed upon ratification of the new bargaining agreement.

While the principle of majority rule in the bargaining unit is no excuse for discrimination, EEOC v. County of Calumet, 686 F.2d at 1256, I conclude from these facts that the plaintiffs were not singled out by their union because of their age. To conclude otherwise would be to hold the union to an unreasonable standard of success in negotiations: that of pleasing all its constituencies all the time.

The fundamental flaw in the plaintiffs' case is its assumption that the ADEA somehow exempts older workers

from the risks inherent in the collective bargaining process. This is simply not ture, and it would be improper for me to so extend the meaning of the ADEA.

For the foregoing reasons, the defendants' motions for summary judgment are GRANTED and this case is DISMISSED.

SO ORDERED at Milwaukee, Wisconsin, this 31 day of July, 1985.

BY THE COURT:

/s/

Terence T. Evans
United States District Judge

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Raymond Bartman, et al.,
v. 83-C-435
Allis-Chalmers Corporation,
et al.

Judge Terence T. Evans

__ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

XXX **Decision by Court.** This action came on for consideration before the Court with the judge named above presiding, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
That defendants' motions for summary judgment are granted and this case is dismissed.

Clerk
Sofron B. Nedilsky
(By) Deputy Clerk
/s/
Regina J. Torcivia 7/31/85

JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604

August 20, 1986
Before
Hon. William J. Bauer, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge

RAYMOND BARTMAN,et al,
Plaintiffs-Appellants,

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 83 C 435
Judge Terence T. Evans

No. 85-2372 v.

ALLIS-CHALMERS CORPORATION, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND LOCAL 248 - UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendants-Appellees.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, Division, and was argued by counsel.

On consideration whereof, IT IS

ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604

October 1, 1986
Before
Hon. William J. Bauer, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge

RAYMOND BARTMAN,et al,
Plaintiffs-Appellants,

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 83 C 435
Judge Terence T. Evans

No. 85-2372 v.

ALLIS-CHALMERS CORPORATION, et al.,
Defendants-Appellees.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Mark J. Rogers, attorney for plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing and suggestion for rehearing en banc. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion for rehearing en banc be and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RAYMOND BARTMAN, et al.,
Plaintiffs,
v.

ALLIS-CHALMERS CORP., et al.,
Defendants.

AFFIDAVIT OF:
ALFONSO MONAR
Case No. 83-C-0435

STATE OF WISCONSIN)
)SS.
MILWAUKEE COUNTY)

Alfonso Monar, being first duly sworn, on oath states as follows:

1. That I am 51 years old, having been born on 9/8, 1932. I am a plaintiff in the above-entitled lawsuit.

2. I began working for Allis-Chalmers Corporation on or about June 6, 1952. I retired on Nov. 15, 1982. Although I had worked for 30 years and was eligible for early retirment [sic], I had not planned to retire at that time and had hoped to work at least several more

years, if possible.

3. From time to time in 1982, I heard statements from Allis-Chalmers complaining about what Allis-Chalmers claimed were high labor costs at the West Allis plant. Allis-Chalmers mentioned the area of benefits, not just wages, as an area of possible cuts. I don't recall the Company talking about the need to cut benefits during the year before earlier contracts were going to expire.

4. In the summer of 1982, it appeared at one time that the Union and Company were close to agreeing on a new contract. However, in late July, negotiations were broken off by the Company. After the negotiations broke down, unfair labor practice charges were brought against the Company. During the late summer and early fall of 1982, it was generally known throughout the West

Allis plant that there was talk that lots of work and machinery was being moved out of the West Allis plant, and that the Company might close down the West Allis plant. The media had reported on some Company documents showing possible plans to move the entire Tractor Division out of West Allis. The contract was set to expire on November 1, 1982, and that date was later extended to November 15, 1982. We learned there would not be a strike and that we would be expected to work without a contract. Several days before the contract expired the Company issued a statement that we were expected to report to work on November 16, 1982, and that we would be paid as under the old contract. However, the Company statement did not say anything about pensions and medical benefits. I understood that without a contract the

Company was free to make whatever changes they wanted in the supplementary pension and medical insurance benefits.

5. With no contract and with no definite word from the company about pension and medical benefits for retirees after November 15, 1982, I had no choice. I had to retire to be sure I would not lose supplemental pension benefits and medical coverage when I retired. I knew after there was no contract spelling out what the pension and medical insurance for retirees would be, the Company could make cuts in pension and cut or eliminate medical benefits for retirees, and I couldn't do anything about it. Based upon the Company's conduct in 1982 and in particular its stated desire to cut costs by reducing benefits, I believed there was a real possibility that the Company would do so after the contract

expired. I could not risk the financial well-being of myself and my dependents by continuing my employment under the circumstances created by the Company. If the Company at least would have said what pension and medical benefits for retirees there would be, if any, for people who worked after November 15th, I would have known where I stood. If they had told me that I would be told of any changes before they went into effect and that I would be given a chance to retire before the changes, if that turned out to be the best for me, I would not have retired. I probably would have kept working even if there were some cuts made in pension and medical benefits. I just needed to know about changes, with enough time to decide to retire because I wanted to, or because it was the right time for me and my family to retire. I knew if a new contract agreement was

reached, I woulf find out about what the new contract had in it for pension and medical benefits for retirees before the ratification vote. I could then decide whether to retire before those change went into effect or not. The problem wasn't what a new contract might have in it, the problem was the Company's refusal to tell me what the pension and medical benefits for retirees would be, if any, when there was no contract. I was not trying to hedge my bets on what cuts might have been made in pension and medical benefits for retirees in the new contract.

6. I would have returned to work after November 15, 1982, if the Company had told employees in writing that they would not institute changes in the retirement and benefits plan without first advising us of the proposed changes and giving us an opportunity to

retire first.

7. On November 30, 1982 I spoke with the president of my union, Richard Roznik about verbal statements which Dan Kern was allegedly making to certain employees. Mr. Roznik suggested that he could not be responsible for the company if the company was not putting their statement in writing.

8. I spoke with Mr. Roznik in early December, 1982 and he suggested that I go to the N.L.R.B. with our claim of forced retirement against the company. Roznik said that we should go to the N.L.R.B. ourselves as he was more concerned about the younger workers who had no vested pension rights.

9. At a union membership meeting in early December, 1982, Eleanor West made a statement to the union leadership that the union should bargain for the return of older workers who were forced to

retire.

10. I attended mandatory meetings in the early part of 1982 conducted by the company where the company showed us charts which purported to itemize the cost per hour to the company for our pension and medical benefits which the company claimed was too high.

11. On at least two occasions I attempted to see Mr. Kern at the employment office in order to question him regarding statements which he was purportedly making. I was not able to meet with him. Bernice Price had told me that the company would not put Mr. Kern's purported statement in writing, and I had wanted to confirm the statement with Mr. Kern.

/s/
Alfonso Monar

Subscribed and sworn to
before me this 7th day June,,
1984
/s/

Robert C. Angermeier

Notary Public, State of Wisconsin
My commission is perm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RAYMOND BARTMAN, et al.,
Plaintiffs, Case No. 83-C-0435
v. AFFIDAVIT OF ROBERT C. ANGERMEIER
ALLIS-CHALMERS CORPORATION, et al.,
Defendants.

STATE OF WISCONSIN)
)SS.
MILWAUKEE COUNTY)

ROBERT C. ANGERMEIER, being first duly sworn, on oath deposes and states as follows:

1. That attached to this Affidavit, and indexed according to the named deponent, are copies of the actual depositions given in this action for the following individuals:

Daniel Kern
Wendell Bueche
Richard Roznick
J. Mitchell Senker
Bernice Price
Howard Equitz
John Collins

2. That based upon a review of the

computer printouts supplied by defendant Allis-Chalmers which provided the date of birth of employees in the workforce on 12/31/81, your affiant correlated the dates of birth with the 216 individuals who retired effective November 15, 1982, as indicated by the list supplied by Allis-Chalmers and marked and identified as Exhibit No. 10 in the Bernice Price deposition. Date of birth information was available for 94% of the 216 individuals sampled.

The average age of the person retiring effective November 15, 1982 was 55.5 years of age.

The same statistical analysis was performed to determine the average date of hire (seniority date) for individuals who retired effective November 15, 1982. The average date of hire for those persons was 1948.

3. Plaintiffs in this action

submitted interrogatories to defendant Allis-Chalmers, requesting them to identify by name, date of birth, and seniority the individuals who replaced each of the plaintiffs after the plaintiffs left the workforce in late October or early November, 1982. Defendant Allis-Chalmers responded that it was not possible to determine that information. As a result, a statistical analysis was done to identify the average age and the average date of hire for individuals who were recalled from layoff in the months immediately following November of 1982. Allis-Chalmers had previously indicated that the information requested concerning who was recalled to replace the workers who retired in late October or early November of 1982 would be contained in the transfer lists. Your affiant reviewed the transfer lists in queston

for the months following the disputed retirements and determined that the average seniority date for workers recalled form layoff during the relevant time periods are as follows:

November, 1982 recalls (85 in number), average date of hire 1971

December, 1982 recalls (27 in number), average date of hire 1971

January, 1983 recalls from layoff (246 in number), average date of hire 1969

February, 1983 recalls from layoff (214 in number), average date of hire 1971

4. A similar analysis was done concerning individuals recalled from layoff during the months following the retirements in issue by reviewing the transfer lists as well as the printouts supplied which indicated the year of birth for employees active in the workforce on 12/31/81. An analysis of those documents reveal that the average age of employees recalled from layoff as

follows:

November, 1982 recalls - average age 35.1

December, 1982 recalls - average age 34.9

January, 1983 recalls - average age 37.2

February, 1983 recalls - average age 36.9

March, 1983 recalls - average age 38.9

Average Age for Period November, 1982 through March, 1983 is 36.7.

A review of the seniority lists do not reveal the presence of anyone who quit or left the workforce on or near November 15, 1982 other than those who separated from the workforce due to retirements which indicates that individuals who were not retirement-eligible were willing to work without a contract.

5. At the beginning, in late December of 1982, plaintiffs in this action sent letters to Allis-Chalmers Corporation, a

copy of which is attached hereto, putting Allis-Chalmers on notice that they felt their retirement was forced and that they were willing to return to work on the condition that the Company would agree to advise retirement-eligible workers of any contemplated changes or modifications in the pension plan prior to the effective date of those changes. A copy of that letter is attached as Exhibit 1. These letters were sent on behalf of all plaintiffs at the same time the EEOC charges were filed. The procedure was modified slightly for the last plaintiffs to file EEOC charges whereby the letter or references in the letter were directed to the attorneys for Allis-Chalmers.

6. Attached as Exhibit 2 is a copy of the proposed Company statement identified by deponent Daniel Kern as Exhibit No. 5 in his deposition on May

26, 1983.

7. Attached as Exhibit 3 is a copy of a Memo to all employees dated November 12, 1982, which was identified by deponent Daniel Kern at page 100 in his deposition.

8. Attached as Exhibit 4 is a copy of a letter directed to Allis-Chalmers employees dated February 3, 1983, which was identified by deponent Wendell Bueche at page 9 of his deposition.

9. Attached as Exhibit 5 is a copy of a report prepared by Allis-Chalmers which indicates on page 4, in the spring of 1982, which reflects the number of retirement-eligible employees (463) as of November 1, 1982. This document was identified by deponent Daniel Kern as Exhibit No. 1 and identified by him at page 76 in his deposition.

10. Attached as Exhibit 6 is a listing of the individuals who retired

effective October 31, 1982. This list was prepared by Bernice Price and was marked as Exhibit 26 in her deposition.

11. Attached as Exhibit 7 is a listing of individuals who retired effective November 15, 1982. This list was prepared by Bernice Price and was marked as Exhibit 10 in her deposition.

12. Attached as Exhibit 8 is a listing of retirements by month from 1980 through 1982, prepared by Bernice Price and identified as Exhibit 25 in her deposition.

13. Attached as Exhibit 9 are newspaper articles appearing on August 19, 1982 and August 21, 1982, reflecting public statements being made by Allis-Chalmers Corporation at the time. these documents were produced by the defendant Unions on June 14, 1983.

14. Attached as Exhibit 10 are copies of the grievances filed by Raymond

Bartman as well as the group grievance filed by Casey Pendzik, copies of which were produced by Allis-Chalmers Corporation in discovery.

15. Attached as Exhibit 11 is a copy of the handwritten agreement between Allis-Chalmers and the United Auto Workers concerning recognition of the Batavia bargaining unit, in exchange for the dismissal of the NLRB charges, which included the forced retirement charge. This document was produced by the defendant Unions pursuant to a request for production on 6/10/83.

16. The following Exhibit 12 are excerpts of bargaining notes from collective bargaining sessions, prepared by various participants at those sessions:

(a) Exhibit 12(a) is a copy of the bargaining notes prepared by a Company representative at Central bargaining on November 5, 1982. This document was produced by Allis-Chalmers Corporation

pursuant to a request for production;

(b) Exhibit 12(b) is a copy of bargaining notes reflecting collective bargaining session on November 10, 1982, prepared by an Allis-Chalmers representative and produced by Allis-Chalmers pursuant to a request for production;

(c) Exhibit 12(c) is a copy of notes and Minutes of the November 24, 1982 meeting between Company and Union, prepared by a representative of Allis-Chalmers Corporation and produced by Allis-Chalmers Corporation pursuant to a request for production;

(d) Exhibit 12(d) is a copy of bargaining notes from the November 30, 1982 collective bargaining session prepared by a representative of Allis-Chalmers Corporation and produced by Allis-Chalmers Corporation pursuant to a request for production;

(e) Exhibit 12(e) is a copy of bargaining notes from a November 30, 1982 bargaining session prepared by Union representative Jeff Kosanke and produced by the defendant Union pursuant to a request for production;

(f) Exhibit 12(f) is a copy of bargaining notes from the November 3, 1982 bargaining session prepared by a representative of the Allis-Chalmers Corporation and produced by Allis-chalmers Corporation pursuant to a request for produciton.

17. Attached as Exhibit 13 is a copy

of a Stipulation demonstrating that the plaintiffs would still be working if they had not retired.

18. Attached as Exhibit 14 is a copy of a report prepared by Allis-Chalmers which gauges the possible impact of increased retirements leading up to November 1, 1982 which was identified as Exhibit 9 in the Equitz deposition.

19. Attached as Exhibit 15 is a copy of the December, 1982 "President's Report" by Richard Roznik.

/s/

Robert C. Angermeier

Subscribed and sworn to before me
this 11 day of June, 1984.

/s/

Mark J. Rogers
Notary Public, Milwaukee County, Wisc.
My Commission: is permanent.

JOINT COMPANY-UNION STATEMENT

The Company has informed the Union that, while it preserves any existing right to modify pay and benefit plans, it has no imminent plan to modify the pension plan or the hospital/medical insurance plan. The Company and the Union recognize that discussion will be held prior to the institution of any changes. Therefore, there would be advance notice of benefit plan changes and the employees would have opportunity to exercise their existing right under the current plan provisions.

Exhibit 2 Page 1

/s/

Kern Exhibit No. 5 5/26/83

Allis-Chalmers

MEMO TO EMPLOYEES

November 12, 1982

In October, Allis-Chalmers and United Auto Workers union representatives agreed to extend the current labor contract to November 15th. Talks between the Company and Union have continued since that time, but to date, have not produced agreements for represented production workers.

The contract will expire at midnight Monday, November 15th. further negotiations meetings are expected and will be scheduled by mutual agreement.

Employees of operations in production are expected to report, as usual, on November 16th, and thereafter are

expected to report in accord with existing work schedules. Wmployees will continue to be paid in line with current compensation programs.

Internal Communications

Exhibit 3 page 1

DISTRIBUTION: All West Allis Employees

ALLIS-CHALMERS

Milwaukee, Wisconsin 53201

WENDELL F. BUECHE
President and
Chief Operating Officer

February 3, 1982

Dear Employee:

This is to keep you informed about Company efforts to negotiate with the UAW for lower hourly labor costs in West Allis.

One part of this effort involves a labor cost reduction in the Foundry. On January 19, the Company gave the Union notice that failure to negotiate the needed labor cost reductions in the Foundry would result in the closing of that operation this year.

We have received notification from the Union that it cannot consider negotiating on the Foundry alone without involving other operations covered by

the present labor contract. Yet, the Union has indicated a willingness to meet with the Company. Because the Foundry is a separate problem, we had hopes of being able to negotiate this issue separately. If the Union feels that this is not possible, we will continue to seek negotiations to solve the problems of non-competitive hourly labor costs for the <u>entire</u> West Allis Complex.

This matter is of great importance to all of us, therefore we are willing to be flexible in the way the discussions with the Union are undertaken. While the Company needs to have progress in the effort to get cost reductions in all of the affected operations, it should be understood that the situation in the Foundry is of the most immediate concern. In its discussions with the

Union on January 19, the Company targeted 30 days for completion of talks on this matter. Failure to negotiate needed cost reductions promptly will result in a decision being made to close the Foundry.

If there is some confusion on just hos labor costs could be reduced, it should be explained that it has never been the Company's intention that these reductions would come only from employees' take home pay. we would prefer that cost reductions be made in the area of benefits as well, which are a very real expense to the Company but which employees do not see on their paychecks.

We are planning to keep you up to date with additional information to make sure that every affected employee fully

understands the situation.

Sincerely,

Wendell F. Bueche

Exh.4 page 1